Supreme Court, U. S.
FILED
APR 2 1942

Supreme Court of the United States

October Term, 1941

No. 997

ANTOINETTE COVIELLO,

Petitioner,

vs.

NEW YORK CENTRAL RAILROAD COMPANY,

Respondent.

BRIEF IN OPPOSITION TO PETITION.

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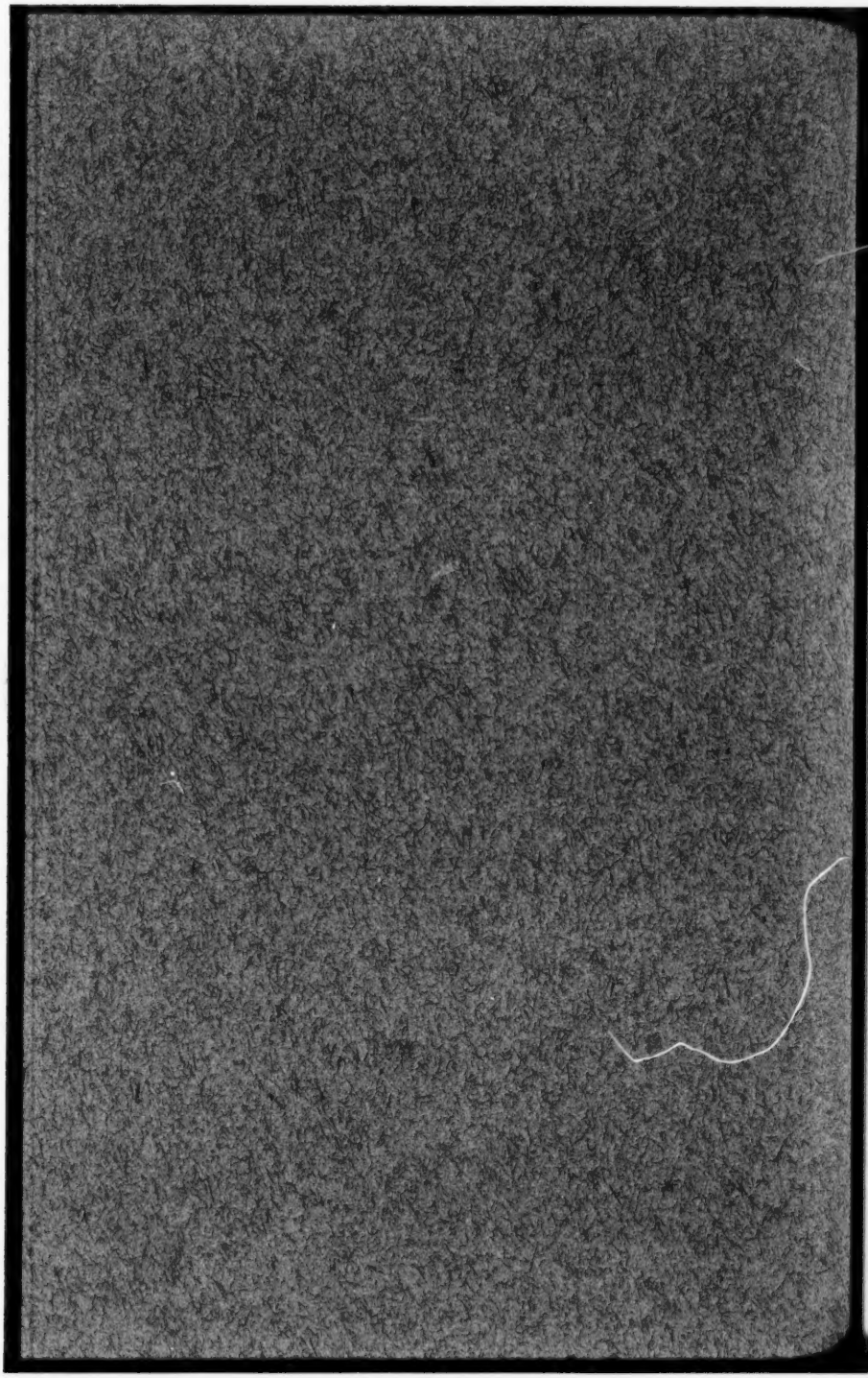

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Statement.

On November 10, 1936, the date of the alleged accident, Guiseppe Coviello was in the employ of New York Central Railroad Company in the capacity of "lampman".

The employee's duties consisted in cleaning wicks and glass in switch lamps, oiling and greasing the Company's switches and replenishing the supply of oil in the switch lamps, in the freight yards at Weehawken, New Jersey, used as a classification yard almost entirely, if not exclusively, for the movement and classification of freight cars moving in transportation between several States. This was requisite for both facility and safety in the operation of the interstate transportation.

The said Guiseppe Coviello was last seen filling the lamps about three o'clock in the afternoon of November 10, 1936.

On November 11, 1936, the employee's body was recovered from the Hudson River.

On October 27, 1938, Antoinette Coviello, the widow, filed a petition in the New Jersey Department of Labor, Workmen's Compensation Bureau, seeking compensation due to her as the sole surviving dependent.

The cause was heard by the Honorable Charles E. Corbin, Deputy Commissioner of Labor, in the Compensation Bureau in Jersey City, New Jersey, on July 7 and July 14, 1939.

At the conclusion of the trial in the Compensation Bureau, the said Deputy Commissioner held that:

> "* * * the petitioner has made a prima facie case that the death of Guiseppe Coviello was due to an accident arising out of and in the course of his employment, but I find and determine that this Bureau is without jurisdiction to award compensation because the employment of the said Guiseppe Coviello and of the respondent at the time of the accident was work of interstate transportation, or so closely related to it as to be a part thereof."

On January 18, 1940, the Honorable THOMAS H. BROWN, Judge of the Hudson County Court of Common Pleas, reversed the judgment of the "Bureau" and, in part, held the work of the deceased consisted mainly in providing oil for the switch lamps and cleaning them; that he had no direct connection with interstate transportation; and therefore concluded that the decision of the referee below must be reversed and an award made in favor of the then petitioner and as against the then respondent.

On March 16, 1940, on application of New York Central Railroad Company, Chief Justice THOMAS J. BROGAN al-

lowed a writ of certiorari to remove the cause to the New Jersey Supreme Court.

On September 25, 1940, the New Jersey Supreme Court, opinion by Chief Justice THOMAS J. BROGAN, in part, said it did not think that the duties performed by the decedent, *i. e.*, cleaning lamps and greasing switches, even though the instrumentalities were used for transportation and commerce that was interstate in character, can be said to be an engagement in interstate transportation or work so closely related to it as to be part of it. He had nothing whatever to do with interstate transportation.

The said Supreme Court further held that the Compensation Bureau had jurisdiction and should have entertained the petition.

The judgment of the Hudson County Court of Common Pleas was affirmed and the writ of certiorari was dismissed.

The New York Central Railroad Company appealed to the New Jersey Court of Errors and Appeals from the decision of the New Jersey Supreme Court and, on April 25, 1941, the said Court of Errors and Appeals reversed the judgment of the New Jersey Supreme Court; thus, in effect, affirming the judgment of the Trial Court, the New Jersey Workmen's Compensation Bureau, ruling that the said Bureau was without jurisdiction to hear and determine the claim.

On Application of the original petitioner, Antoinette Coviello, the New Jersey Court of Errors and Appeals granted leave to reargue the appeal.

By an opinion filed on January 9, 1942, the New Jersey Court of Errors and Appeals held that:

> "• • • the judgment should be reversed for the reasons set down in the opinion heretofore filed herein and reported in 126 N. J. L. 536."

POINT I.

Guiseppe Coviello was engaged in interstate transportation.

It is obvious that the purposes of greasing the switches and the cleaning the lamps and replenishing the supply of oil in the lamps, on the tracks or switches of the railroad company's classification yards, is to facilitate the operation and progress of cars and trains moving on the tracks, and further the safety of persons and property.

In *Pedersen* v. *Delaware, Lackawanna & Western Railroad Co.*, 229 U. S. 146, it was held that one engaged in the work of *maintaining tracks* and bridges in *proper condition* after they have become, and during, their use as instrumentalities of interstate commerce is engaged in interstate commerce, and this, even if those instrumentalities are used both in interstate and intrastate commerce. This case has never been departed from.

In *Shanks* v. *Delaware, Lackawanna & Western R. R. Co.*, 239 U. S. 556, 36 S. Ct. 188, the Court, in part, said:

> "* * * Coming to apply the test to the case in hand it is plain that Shanks was not employed in interstate transportation (569) or in repairing or *keeping in usable condition* a *roadbed*, bridge or car, or other instrument then in use in such transportation * * *."

In both cases hereinbefore cited, by inference, an employee engaged in the work of maintaining tracks or keeping a roadbed in usable condition, after they had become and during their use as instrumentalities of interstate commerce or interstate transportation, is engaged in interstate commerce within the meaning of the federal act.

In *Stiedler* v. *P. R. R. Company*, 94 N. J. Law 197; *Certiorari denied*, 253 U. S. 489, 64 L. Ed. 1027; it was held that an injury sustained while painting a pole supporting electric wires which carried current to the third rail, came within the Federal statute.

The term "transportation" implies the carrying or conveying from one place or station to another.

Such conveying or carrying, by interstate railroad service, is done by means of cars, trains and boats. The cars and trains are propelled along tracks of the roadbed. Therefore, the cars, trains and tracks are primarily essential for such "transporting."

The "switches" form an important and necessary means of continuity of progress of cars and trains on the proper tracks and the keeping of them in a usable condition is attained by greasing them. Such assignment was part of deceased's duties.

The switch lamps are a necessary adjunct to the working of the switches and the scheme of safety and guidance in the operation of the means of transportation. To be effective, the lamps must be provided with means of illumination. Such was the other assignment of duty to deceased.

Thus, the deceased's duties were solely and exclusively in the care and upkeep of part of the actual instrumentalities of "transportation." He was not engaged in some remote activity, such as supplying sand or water to be used, or repairing or erecting parts of buildings incidental to the general operation of the railroad in interstate "commerce."

The case of *Chicago Northwestern R. R. Co.* v. *Bolle*, 284 U. S. 74, cited in petitioner's brief on this application, refers to an employee whose duties were to fire a stationary engine to generate steam for heating a passenger depot, baggage room and other structures and rooms used for general railroad purposes. The steam was also used to heat

suburban passenger coaches while standing in the yard, some of which were taken off interstate trains and heated when necessary before being taken up by other interstate trains.

This Court, opinion by Justice SUTHERLAND, said:

> "At the time of receiving his injury he was engaged in work not incidental to transportation in interstate commerce, but purely incidental to the furnishing of means for heating the station and other structures of the company. His duty ended when he had produced a supply of steam for the purpose. He had nothing to do with its distribution or specific use. Indeed, what he produced was not used or intended to be used, directly or indirectly, in the transportation of anything."

This decision does not seem to be dispositive of the facts and claim in the *Coviello* case because Coviello was engaged in work incidental to transportation. His duties were solely confined to the care of the tracks, the instrumentalities of continuity of progress of the freight trains that transported interstate shipments.

In *Chicago & Eastern Illinois R. R. Co.* v. *Industrial Commission*, 284 U. S. 296, the employee was injured while attempting to oil an electric motor. The motor furnished power for hoisting coal into a chute to be taken therefrom by and for the use of locomotive engines principally employed in interstate work.

Again these facts are different than those in the *Coviello* case. The duties were too remote to be considered "interstate", while Coviello's duties were actual participations in the care of the instrumentality of the means of interstate transportation.

In the case of *New York, New Haven & Hartford R. R. Co.* v. *Bezue*, 284 U. S. 415, the employee was helping to remove a pair of main driving wheels from a lathe in the hoist

building and rolling them to the engine pit in the yard. The wheels were to be installed on a locomotive.

That operation was too remote to be considered in "interstate transportation". The wheels *were to be* installed but in the *Coviello* case the tracks had been installed and were in actual use for interstate transportation purposes.

The decision of the New Jersey Court of Errors and Appeals in this case is in accord with the applicable decisions of this Court as it is in agreement with the principles set forth in the case of *Shanks* v. *Delaware, Lackawanna & Western R. R. Co., supra,* and the many cases that followed. Coviello's work was the making usable of an instrumentality in actual use, and necessary to the operation of interstate transportation and in that respect is distinguishable from the cases cited in petitioner's brief.

POINT II.

There is no real conflict of decisions involved in the various jurisdictions, and the situation stands practically alone, inasmuch as the death of the employee occurred before the present amendment to the Employers Liability Act.

Ermin v. *P. R. R. Company,* 36 Fed. Supp. 936.

POINT III.

It is respectfully submitted that the writ should be denied.

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